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Right of peoples to self-determination

Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly, in accordance with General Assembly resolution 57/196 of 18 December 2002, the report prepared by Mr. Enrique Bernales Ballesteros (Peru), Special Rapporteur on the question of the use of mercenaries.

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Summary

General Assembly resolution 57/196 of 18 December 2002 requested the Special Rapporteur, inter alia, to continue working to propose a clearer definition of mercenaries, including clear nationality criteria, and to make suggestions on the procedure to be followed for international adoption of a new definition. The Special Rapporteur devotes the present report to fulfilling that request.

After analysing in section III the evolution of mercenary activities from the establishment of the mandate in 1987 to the present day, the Special Rapporteur devotes section IV to the question of the legal definition of mercenary, making reference to his studies on the subject, the proposals received and the outcomes of the expert meetings held in Geneva in 2001 and 2002. He notes that the cumulative nature of the requirements stipulated in the definition, the possibility of evading those requirements by fraud in law and, in general, the definition's imprecision, technical deficiencies, obsolete elements and legal loopholes meant that many mercenaries who had committed serious offences were not characterized as such and ultimately escaped any kind of punishment. That created a situation where the international community was defenceless against mercenaries, particularly those active in the smallest countries and archipelagic countries.

The Special Rapporteur concludes that the definition of mercenary contained in article 1 of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries is very difficult to apply in practice and that, if mercenary activities are to be prevented, eradicated and punished, the definition must be modified by amending the Convention.

The legal definition of mercenary proposed by the Special Rapporteur appears in the annex to this report. The alternative definition he proposes considers the participation of mercenaries in international and internal armed conflicts and in concerted acts of violence; is not limited to the mercenary as an individual agent but includes mercenarism as a concept related to the responsibility of the State and other organizations and individuals; and covers illicit acts such as trafficking in persons, arms and drug trafficking and other illicit trafficking, terrorism, international organized crime, abduction, etc., as well as actions to destabilize legitimate governments and actions aimed at taking forcible control of valuable natural resources. The Special Rapporteur requests the General Assembly to bring his proposal to the attention of the States parties to the Convention.

Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

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I. Introduction

1. During its fifty-seventh session, the General Assembly adopted resolution 57/196 of 18 December 2002 by which it, inter alia, urged States to take the necessary steps against the activities of mercenaries.

2. The General Assembly decided to consider at its fifty-eighth session the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. It requested the Special Rapporteur to report to it at that session, with specific recommendations, his findings on the use of mercenaries to undermine the right of peoples to self-determination. It also requested him to continue taking into account in the discharge of his mandate the fact that mercenary activities continue to occur in many parts of the world and are taking on new forms. It further requested him to continue working to propose a clearer definition of mercenaries, including clear nationality criteria, based on his findings, the proposals of States and the outcomes of the meetings of experts, and to make suggestions on the procedure to be followed for international adoption of a new definition.

3. The General Assembly called upon States to investigate the possibility of mercenary involvement wherever criminal acts of a terrorist nature occur and to bring to trial those found responsible or to consider their extradition, if so requested, in accordance with domestic law and applicable bilateral or international treaties. It stressed the entry into force of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (resolution 44/34, annex) and called upon States that had not yet done so to consider signing, acceding to or ratifying it, as a matter of priority.

4. The General Assembly requested the Office of the United Nations High Commissioner for Human Rights, as a matter of priority, to publicize the adverse effects of the activities of mercenaries on the right of peoples to self-determination and, when requested and where necessary, to render advisory services to States that are affected by the activities of mercenaries.

5. The Commission on Human Rights, for its part, adopted resolution 2003/2 on 14 April 2003, during its fifty-ninth session. It recognized that armed conflicts, terrorism, arms trafficking and covert operations by third Powers, inter alia, encourage the demand for mercenaries on the global market. It reaffirmed that the use of mercenaries and their recruitment, financing and training are causes for grave concern to all States and violate the purposes and principles enshrined in the Charter of the United Nations. It also invited States to investigate the possibility of mercenary involvement in criminal acts of a terrorist nature.

6. The Commission requested all States to exercise the utmost vigilance against any kind of mercenary activity promoted by private companies offering international military consultancy and security services, as well as to impose a ban on such companies' intervening in armed conflicts or actions to destabilize constitutional regimes. It requested the Special Rapporteur to consult States and intergovernmental and non-governmental organizations in the implementation of the resolution and to report, with specific recommendations, his findings on the use of mercenaries to the Commission at its sixtieth session.

7. It requested the Special Rapporteur to continue taking into account that mercenary activities are continuing to occur in many parts of the work and are taking on new forms.

8. Accordingly, and pursuant to resolution 57/196, the Special Rapporteur has the honour to submit this report to the General Assembly for consideration at its fifty-eighth session.

II. Activities of the Special Rapporteur

A. Implementation of the programme of activities

9. The Special Rapporteur travelled to Geneva from 19 to 24 March 2003 to attend the fifty-ninth session of the Commission on Human Rights and from 23 to 27 June 2003 to attend the tenth meeting of special rapporteurs/representatives, experts and chairpersons of working groups of the Commission on Human Rights. While in Geneva, the Special Rapporteur held consultations with representatives of various States and met with members of non-governmental organizations. He also held working meetings with the new Special Procedures Branch of the Office of the United Nations High Commissioner for Human Rights.

B. Correspondence

10. By letter dated 23 May 2002, the Permanent Mission of the United States of America to the United Nations Office at Geneva informed the Special Rapporteur that its Government was renewing its invitation to him to visit that country and was proposing that the visit take place at the end of January 2003. The Special Rapporteur reiterates his gratitude for the invitation from the Government of the United States of America. At the same time, he regrets the circumstances that have thus far prevented the two sides from determining when they would both have time available so that he can schedule the visit. According to preliminary conversations, the Special Rapporteur would use the visit to obtain information on matters related to his mandate, such as the connection between mercenary activities and terrorism and between mercenarism and trafficking in persons, arms and drugs; the use of mercenaries by organizations of exiles seeking to overthrow the governments of their own countries; and private military security companies. The Special Rapporteur would also like to obtain detailed information on some Florida-based Cuban-American organizations that the Government of Cuba has repeatedly denounced for using mercenaries to carry out activities contrary to international law. For the past five years, he has been looking into the case of the attacks on tourist facilities in Cuba between 1996 and 1998. All the evidence gathered makes it necessary to obtain information on those organizations. Indefinite postponement of his visit would force the Special Rapporteur to close his report in its present state for submission to the Commission on Human Rights.

III. Evolution of mercenary activities

11. Following repeated extensions of his mandate, this is the last report that the Special Rapporteur will submit to the General Assembly. The present section will discuss the evolution of mercenary activities over the duration of his mandate.

12. The three issues with which he first dealt were: problems created by the policy of apartheid pursued by the then Government of South Africa; the armed conflict in Angola; and the armed conflict in Nicaragua. In all three cases, the presence of mercenaries was undeniable, and relevant information was required to enable the United Nations to take a firm position against the presence of mercenary agents.

13. The armed conflict in Angola arose after the country's independence in 1975 and was a result of its former colonial domination. The process of organizing a sovereign, democratic Angola committed to the sound use of its natural resources was interrupted by the appearance of the União Nacional para a Independência Total de Angola (UNITA), a rebel movement which, under the leadership of Jonas Savimbi, refused to recognize the democratic Government of President Eduardo dos Santos and managed to gain a foothold in certain key areas of Angolan territory.

14. The armed conflict in Angola was long and bloody. The Special Rapporteur was able to observe the tragic situation in that country when he visited it on mission in 1988. He witnessed at first hand both the violence of the conflict and the presence of entire battalions of mercenaries from South Africa who were fighting alongside UNITA and thereby aggravating the conflict. There is no doubt that apartheid prompted the then rulers of South Africa to pursue expansionist policies, arming military units of mercenaries to intervene in the Angolan conflict in order to impose UNITA on the Government of Angola. The conflict continued throughout the 1990s, even though the parties signed a number of peace agreements under United Nations auspices. The Special Rapporteur monitored the conflict and found that one reason for its continuation was the presence of mercenaries. The conflict has now ended, there are no mercenaries in Angola and there is reason to hope that peace in that country will contribute to political stability and economic progress.

15. As indicated in the preceding paragraphs, apartheid promoted the presence of mercenaries in Angola, but its destabilizing activity affected all southern Africa. From the beginning of his mandate, the Special Rapporteur received complaints about the policy of systematic violation of human rights that apartheid was imposing in South Africa, particularly against the African National Congress (ANC), whose leaders were persecuted outside South African territory and, in more than one case, murdered by mercenaries recruited by the apartheid regime. The Special Rapporteur described in his reports apartheid's adverse effects on the self-determination and human rights of African peoples and how it was the source of mercenary activities throughout much of Africa.

16. Years later, in the 1990s, South Africa freed itself from that regime, replacing it with a multiracial democracy that respected its various ethnic communities and was firmly committed to protecting human rights. In that new context, the Special Rapporteur visited South Africa in 1997, where he travelled to various towns, talked to the democratic authorities and made contact with the Truth Commission, intellectuals and victims of apartheid.

17. Today, South Africa is a solid, progressive democracy. Its position condemning mercenary activities is firm and it even has a law prohibiting any kind of mercenary activity, having moved ahead in the regulation and supervision of private companies that offer security services internationally so as to prevent them from employing mercenaries and intervening in armed conflicts in other countries.

18. The Special Rapporteur also had to concern himself with the ongoing armed conflict in Nicaragua. The international community was following that conflict closely and was outraged at situations such as the Iran-Contra scandal, which revealed the involvement of agents of the United States Central Intelligence Agency (CIA) in covert operations in support of the contras. The Special Rapporteur visited Nicaragua on mission in 1989, where he received numerous complaints about the presence of mercenaries alongside the contras. Covert operations were undermining the political stability of the country and prolonging an armed conflict that cost the lives of several thousand Nicaraguans. The development of that conflict and the need to obtain more information made it necessary for the Special Rapporteur to visit the United States of America in 1989, where he was able to obtain valuable additional information, especially on so-called covert operations, through the cooperation of the United States authorities, members of Congress, staff, members of non-governmental human rights organizations and university researchers. The Central American peace agreements, particularly the Esquipulas II Agreement, finally created a political climate in which Nicaragua could enjoy greater political stability.

19. In the early 1990s, the Special Rapporteur had to make a visit to Maldives, where a coup d'état, carried out by an expedition of mercenaries recruited, trained and financed in Sri Lanka and made up of members of the Tamil ethnic group, most of them young men aged between 18 and 22, had been staged by elements seeking to take control of the country and refusing to recognize its lawfully constituted authorities. The aggression failed, but the Special Rapporteur's mission enabled him to report to the General Assembly on two risk situations. The first was the tremendous vulnerability of small and archipelagic countries to attacks, generally from abroad, which could affect their right to self-determination and in which there was a mercenary connection with the aggression.

20. The other risk situation was that, to carry out expansionist policies or achieve power ambitions, any State, organization or enterprising or affluent politician could assemble a mercenary army relatively easily, calling on inexperienced young men who, for a minimum wage, could become involved in pitiful ventures. This was precisely the situation that affected the sovereignty of Maldives for several days, in which young Tamils, some of them no more than teenagers, were deployed as mercenaries.

21. In the 1990s, the Special Rapporteur's work acquired an unusual dimension. On the one hand, the break-up of the Soviet Union and the creation of sovereign, independent States on its former territory gave rise to frictions among some of those States as a result of border disputes, national rivalries and other reasons. In that context, mercenaries appeared who went from one place to another offering their military services. The Special Rapporteur's reports pointed to the emergence of new forms of mercenary activity, such as "weekend wars", the transformation to mercenaries of soldiers who deserted from their national armies, arms trafficking between one republic and another and the carrying out of terrorist acts by mercenaries. Although some conflicts were resolved and others disappeared, armed tensions persist.

22. The Special Rapporteur also dealt with the armed conflict in Afghanistan. That conflict involved mercenaries and there was a discussion about the presence of mujahedin, known as religious or Muslim fighters, who were fighting for a cause and not for financial reasons. The Special Rapporteur drew attention to the problem, stating that while those who volunteered to defend a national cause or a faith could in no way be accused of being mercenaries, the fact that some might be acting as mercenaries could not be ignored. In any event, long before 11 September 2001, the Special Rapporteur warned in his reports about the terrorist nature of some of the Taliban's activities in Afghanistan and the danger posed in that context by the protection given to terrorist organizations.

23. Also in the 1990s, the Special Rapporteur had to deal with the armed conflicts in the territories of the former Yugoslavia, involving Croatia, the Federal Republic of Yugoslavia and Bosnia and Herzegovina. Given the reports received of the presence on all fronts of mercenaries of the most diverse nationalities, the Special Rapporteur visited the region in September 1994 and saw the seriousness of the conflicts raging there.

24. In those conflicts, the Special Rapporteur established some criteria as to the operating modalities of mercenaries, for instance, that of the young men from South American countries who rapidly became naturalized thanks to distant direct relatives who had been nationals of one or other country involved in the conflict, or again that of the mujahedin, about whom it was suspected, in more than one case, that they had been armed and sent by third Powers to fight, in the guise of volunteers, in certain parts of the Balkans.

25. Africa was an ongoing concern throughout the Special Rapporteur's mandate, first, because of the absolute need to defend self-determination in countries newly emerged from colonial domination and often torn by internal conflicts inherited from that period and, second, because States from outside the region and powerful economic interests have taken advantage of the political inexperience and instability that usually accompany the birth of independent States to foster tensions and armed conflicts, in the midst of which they have introduced unfair contracts and reimposed strict controls on the exploration and exploitation of natural resources, especially precious stones

26. Conflicts gradually broke out in various subregions of the African continent, causing the loss of thousands of human lives and an objective situation of humanitarian disaster. Mercenaries were present in most of the countries affected by these armed conflicts. What is more, the Special Rapporteur indicated in his reports in the 1990s that, while in the wars of independence from colonial domination most mercenaries came from Europe, these new conflicts were characterized by the presence of young Africans from neighbouring countries or different ethnic groups, fighting as mercenaries in return for minimum wages.

27. In support of the reports of other thematic and country rapporteurs and the working groups set up on various occasions in the United Nations to find solutions to Africa's problems, the Special Rapporteur drew attention repeatedly to the need both to end the presence of mercenaries in Africa and to put a stop to the presence of private military security companies, which were recruiting mercenaries and were linked throughout the decade to lucrative business interests.

28. The preceding paragraph mentioned private companies that offer military security services internationally and are involved in the recruitment and employment of mercenaries. The Special Rapporteur had to take up this problem, even though originally it did not arise in connection with the principle of self-determination. He did so because of the rapid growth of such companies and their establishment as power centres in the international market, but he was dealing with issues and matters that had until then been subject to the sovereignty of States and possibly to the adoption of policies on military matters, either by the United Nations or by regional organizations. The Special Rapporteur undertook a mission to the United Kingdom of Great Britain and Northern Ireland in January 1999 to study the issue in depth, given the existence of such companies registered there and the interest of both the British Government and concerned British scholars and experts in devising measures that would permit some kind of oversight of those companies.

29. These companies are modern, multipurpose, transnational companies, which do not hesitate to recruit mercenaries for certain of the activities they offer. They tend to be highly efficient in matters of military science, but they also tend to have few scruples about recruiting mercenaries for difficult, highly dangerous mission in zones and territories where violence and armed conflicts are taking place.

30. At the Special Rapporteur's suggestion, the issue of military security companies was taken up at the two meetings of experts on mercenaries held in Geneva in 2001 and 2002. The conclusion arrived at by the Special Rapporteur in this regard is that such companies need not be banned, but that domestic and international law must deal with the issue so that there are oversight, regulation and monitoring mechanisms that clearly differentiate military consultancy services from participation in armed conflicts and from anything that could be considered intervention in matters of public order and security that are the exclusive responsibility of the State.

31. In Latin America, too, there were some problems that required the Special Rapporteur's attention. The 1980s saw armed conflicts in three Central American countries: El Salvador, Guatemala and Nicaragua. Cuba suffered attacks on its territory by outside groups seeking to destabilize its Government. In Colombia, long-standing violence prevented the peace agreements signed in 1990 and 1992 from extending to all the rebel groups. In Peru, a Maoist group, the self-styled Communist Party of Peru, or Sendero Luminoso, had plunged the country into a virulent armed conflict that in two decades caused some 30,000 deaths. Another insurgent group in that country was the Movimiento Revolucionario Tupac Amaru (MRTA). Panama, for its part, had to contend with the corrupt dictatorship of General Noriega, while Suriname saw the emergence of an armed group seeking to create a situation of guerrilla warfare.

32. Mercenaries were present in some of those conflicts. The Special Rapporteur received reports on a number of occasions about the presence of mercenaries in the Colombian armed conflict, mainly connected with the drug cartels but also with self-defence paramilitary groups and even private oil companies which, according to the reports received, contracted with private security companies that recruited mercenaries to protect their camps and facilities in jungle areas. The presence of mercenaries was also mentioned in Peru, in connection with some activities by gangs of drug traffickers and paramilitaries who operated in association with the National Intelligence Service (SIN) during the government of Alberto Fujimori.

33. The Special Rapporteur received complaints on a number of occasions about mercenary activities, some directly targeting the sovereignty and self-determination of peoples. Many of these complaints referred to specific acts of sabotage, attempts on people's lives, assassination attempts, bombings of military facilities and hotels and, generally, actions designed to disrupt normal, everyday life. In Cuba, a series of attacks on tourist facilities began in 1997, at a time when the country's economy was giving priority to investments in tourism as a means of obtaining foreign exchange in the context of the United States embargo against Cuba. When President Fidel Castro attended the Tenth Ibero-American Summit in Panama, evidence emerged of a plot against his life.

34. The Special Rapporteur undertook an official mission to Cuba in 1999 to further his investigation into the death of an Italian tourist at a time when Havana was the target of attacks on tourist facilities. During his visit, he made an exhaustive study of the reported events. He was even able to visit the prison where the individuals who took part in the attack that caused the Italian tourist's death are being detained. He visited them in prison and was able to ascertain their motive, their prior contacts, their training, their connections and how the attack was carried out. There is no doubt that they were mercenaries of Central American origin who had been recruited to carry out crimes in Cuba. The Special Rapporteur made a note of that situation, while also advocating the right to life of two of the detainees who had been sentenced to death. Fortunately, so far their death sentence has not been carried out and it is hoped that it will ultimately be commuted.

35. To continue his investigation of the complaints made by the Cuban Government, the Special Rapporteur undertook official missions to El Salvador and Panama. In El Salvador, he investigated the existence of cells organized by Luis Posada Carriles, an agent of Cuban origin, which were very active in planning attacks against the Cuban Government and which had allegedly planned the attacks on tourist facilities in Havana and other cities. Posada Carriles and three other Cubans from Florida were arrested in Panama, accused of participating in the plot against the life of President Castro.

36. The Special Rapporteur submitted reports to the General Assembly and the Commission on Human Rights in 2002 and March 2003 and gave his views on the responsibility of Posada Carriles and the other detainees. He hopes to be able to travel to the United States of America in order to, inter alia, complete his investigations and hear the views of organizations of Cubans living in that country, particularly in Florida. Members of those organizations are alleged to have planned and financed the attacks on Cuban territory.

37. Another issue addressed in the Special Rapporteur's reports was terrorism. Many of the complaints received by him concerned terrorist attacks committed by mercenaries, in other words, ideologically motivated acts of violence and criminal acts which provoke a collective reaction of terror. Those complaints referred to mercenaries as agents entrusted with carrying out terrorist attacks on behalf of either a State or an organization with a clearly political or religious ideology.

38. The Special Rapporteur has systematized the information on terrorism and identified various modalities by which a criminal connection can be made between terrorism and mercenaries. This is not an organic, ongoing relationship. In most cases, the terrorist is an ideological fanatic whose personality has been substantially

altered, turning him into someone who kills indiscriminately. However, those who plan terrorism do not always trust the cause's fanatical militants.

39. Planning an act of terror sometimes requires, depending on its scale and characteristics, sophisticated, professional know-how in the handling of military instruments (explosives, chemical compounds, weapons, aircraft, transport operations, attack strategies, etc.) which cannot be entrusted to an inexperienced militant. Therefore, planning of the crime is entrusted to a military expert who agrees to be hired. This creates a complex situation in which the agent is a mercenary by motivation and a terrorist by virtue of the nature of the criminal act he carries out.

40. This brief summary shows how the Special Rapporteur on mercenary activities identified the various modalities that can be observed in the day-to-day conduct of mercenary activity. The original resolutions of the Commission on Human Rights and the General Assembly framed his mandate in the context of upholding the principle of self-determination of peoples and against the violation of human rights in general by mercenaries. The Special Rapporteur's investigations respected those two key criteria, but incorporated aspects and manifestations of the mercenary phenomenon that present the mercenary's conduct as that of a multifaceted criminal. This is the standpoint from which the Special Rapporteur's mandate has developed. The direction of his research shows that, because mercenary activity is functional to crime, it will always have to be vigorously combated.

IV. Legal definition of mercenary

41. In the course of his work, the Special Rapporteur found that one of the problems in combating mercenary activities was the absence of a clear and comprehensive legal definition of mercenary.

A. Background

42. In 1987, when the Special Rapporteur first received a mandate to examine the question of the use of mercenaries, he found that the only international provision dealing with the issue was article 47 of the 1977 Protocol I Additional to the Geneva Conventions of 1949. At that time, an ad hoc committee was working on a draft convention against the recruitment, use, financing and training of mercenaries.

43. The Special Rapporteur focused initially on reports of the presence of mercenaries in international and internal armed conflicts, but when he came to make a legal analysis of mercenary activities he found that General Assembly resolutions condemning mercenary activities and article 47 of Additional Protocol I did not provide a good enough basis for considering the phenomenon from a legal standpoint or for prosecuting mercenaries as agents of an international crime.

44. In the Special Rapporteur's view, the definition of mercenary in article 47 of Additional Protocol I is out of step with the thinking behind his mandate. That definition denies the mercenary the rights of a combatant by not treating him as a prisoner of war. Given its nature as an instrument of international humanitarian law, the Protocol does not legislate on mercenaries themselves, but on their possible appearance in an armed conflict.

45. The Protocol does not attempt to eliminate or proscribe mercenary activities, but simply to regulate a specific situation by stipulating that a mercenary captured during armed conflict shall not be treated as a prisoner of war. The second part of article 47 of the Protocol contains a list of cumulative conditions that must be met in order to determine whether or not an individual is to be considered a mercenary for those purposes, but the Special Rapporteur regards that definition as inadequate in operational terms. Between 1970 and 2000, armed conflicts took many forms and became very complex and mercenaries operated in many different ways, leaving article 47 ineffective in combating mercenary activity.

46. The loopholes and shortcomings of the international legislation against mercenaries are compounded by the fact that the domestic legislation of most States does not criminalize mercenary activity. A mercenary or suspected mercenary may become a social outcast, but the law can take no action against him. Moreover, even when there is legislation criminalizing mercenary activity, it is often not enforced. To quote an example I cited in an earlier report to the Commission on Human Rights (E/CN.4/1999/11), the Foreign Enlistment Act of 1870 (United Kingdom of Great Britain and Northern Ireland) prohibits British citizens from becoming mercenaries and from recruiting mercenaries. However, the last case in which a person was tried under that law dates back to 1896, even though there have been reports of British citizens operating as mercenaries in various armed conflicts, particularly in Africa, over the past 30 years.

47. In 1989, by its resolution 44/34, the General Assembly adopted the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. However, the Convention entered into force only in 2001. Some of its provisions could be considered progress towards eradicating mercenary activity, since they facilitate its prosecution and inter-State cooperation in that regard, but the Convention contributes little to the definition of mercenary. Article 1, paragraph 1, repeats almost word for word the definition of mercenary found in article 47 of Additional Protocol I, while article 1, paragraph 2, refers to mercenary violence against the constitutional order or territorial integrity of a State. As a result, the Convention does not substantially improve the definition of mercenary, and the absence of a more workable definition prevents rapid, direct action in prosecuting mercenaries who commit crimes.

48. The Special Rapporteur systematically examined various cases of mercenary activity and found that mercenarism was taking on new forms, thanks to the absence of adequate international legislation. His reports referred to the emergence of private international security and military consultancy companies which recruited mercenaries for a variety of services and whose operations were facilitated by the loopholes in international legislation. Other legislative loopholes were those making it possible to change nationality to conceal one's identity as a mercenary; those making it possible for non-resident nationals of a particular country to be paid to attack their own country by a third State or by organizations which concealed their political nature; those enabling people with two or more nationalities to exploit that fact; those enabling mercenaries to be involved in trafficking and organized crime; and lastly, those making it possible to hire experts to carry out one or more of the acts involved in a terrorist attack. What explanation is there for these forms of mercenary activity, many of which were unknown before the 1970s?

49. The situation led the Special Rapporteur, in an earlier report to the General Assembly (A/54/326), to state: "The lack of clear, comprehensive and consistent international legislation prohibiting mercenary activities is one of the chief problems detected in relation to mercenaries. The Special Rapporteur deems it necessary to study the apparent connection between the increase in mercenary activities and the obvious gaps in the international legislation currently in force. Furthermore, the increasing tendency of mercenaries to hide behind modern private companies providing security and military advice and assistance may be due to the fact that international legislation has not taken account of new forms of mercenary activity".

50. Despite statements condemning mercenaries, their numbers are increasing, companies that recruit mercenaries are springing up and organizations with mercenary-like positions are operating. The persistence, numbers and variety of operating methods of mercenaries and the support networks and organizations that hide behind their activities show that States, particularly the smallest and weakest States, the least developed States, archipelagic States, States with rich natural resources but a fragile political structure and States faced with armed insurrection and internal conflict, are not properly protected against mercenarism in its various forms. The international legal instruments condemning mercenary activity are imperfect and incomplete: they are characterized by loopholes, imprecisions, technical deficiencies and obsolete elements which lend themselves to very ambiguous interpretations. Genuine mercenaries tend to rely on those imperfections and legal loopholes to avoid being characterized as such.

51. To sum up, the gaps in the legal provisions on mercenaries have been a permanent concern for the Special Rapporteur, who considered that they created a situation in which the international community, particularly the smallest countries, was defenceless in the face of mercenary activities. He pointed out that the serious crimes committed by mercenaries had gone unpunished and that a situation of impunity existed that was impossible to conceal.

B. Studies regarding a legal definition of mercenaries

52. In response to the Special Rapporteur's continued appeals, the General Assembly adopted a number of resolutions authorizing a series of measures to be taken to encourage and elicit a proposed legal definition of mercenary. By its resolution 54/151 of 17 December 1999, the General Assembly:

(a) Acknowledged in various ways that the question of mercenaries should be updated and that a better legal definition should be developed;

(b) Invited Governments to make proposals towards a clearer legal definition of mercenaries;

(c) Requested the United Nations High Commissioner for Human Rights to convene expert meetings to study and update the international legislation on mercenaries and to propose recommendations. Two meetings of experts were held in 2001 and in 2002, in Geneva;

(d) Expressed support for the Special Rapporteur, so that he could continue his research and tackle the question of a legal definition of mercenary.

53. In order to fulfil this responsibility, the Special Rapporteur gathered the opinions and suggestions of States, reviewed and systematized all the information and experience accumulated since 1988 in the performance of his mandate, consulted other sources of various United Nations bodies and examined information and analyses from other special procedures. He also took part in the two meetings of experts convened by the Office of the High Commissioner for Human Rights. His analysis compared information, facts, opinions and drafts against the current state of international instruments on the question.

54. The Special Rapporteur's checklist for a new legal definition of mercenary (see annex) highlights the following:

(a) Empirical evidence shows that because international law does not deal thoroughly enough with mercenary activity, the criminal activities of mercenaries have expanded. Those activities are rightly characterized as crimes, but even in cases where mercenaries were brought to trial for crimes such as aggravated homicide, the fact that they were mercenaries was never taken into account, even as an aggravating circumstance;

(b) Empirical evidence also shows that mercenary activities seriously violate one or more legal rights. The nature and motivation of a mercenary's activities always threaten fundamental rights such as the right to life, physical integrity or freedom of individuals. Such activities also threaten the peace, political stability, legal order and sound use of the natural resources of peoples where mercenaries operate;

(c) Mercenary activity must be considered a crime in and of itself and be internationally prosecutable, both because it violates human rights and because, in most of its manifestations, it affects the self-determination of peoples. In this crime, the mercenary who participates directly in the commission of the crime must be considered a perpetrator with direct criminal responsibility. It must also be borne in mind that mercenary activity is a complex crime in which criminal responsibility falls upon those who recruited, employed, trained and financed the mercenary or mercenaries and upon those who, while they may not have recruited, employed, trained or financed the mercenary, nevertheless planned and ordered his criminal activity;

(d) Where mercenary activity is proved to have occurred because of a decision by a third Power which uses mercenaries to intervene in another State, cause it material harm, generate political instability or commit any kind of attack on individuals or physical installations, that activity must be considered a covert crime. Hiring mercenaries in order to avoid acting directly cannot be considered a mitigating factor, as international law tolerates neither direct nor indirect intervention. States which use mercenaries to attack another State or to commit unlawful acts against persons must be punished;

(e) Mercenaries themselves use their professional know-how and sell it for the commission of a crime which, depending on the type of mercenary activity involved, affects the self-determination, peace, political stability and natural resources of countries where it takes place or violates human rights, primarily the right to life;

(f) The term "mercenary" signifies, and applies to, persons with military training who offer paid professional services to take part in criminal activity.

Mercenary activity has usually involved intervention in an armed conflict in a country other than the mercenary's own. That is why, traditionally, a connection has been made between mercenary activity and self-determination. However, that is not always the case and intervention is only one of a number of different possible types of criminal act;

(g) The presence of mercenaries has been noted in such activities as arms and drug trafficking, illicit trafficking in general, terrorism, destabilization of legitimate governments, acts related to forcible control of valuable natural resources, selective assassination, abduction and other organized criminal activities. What is involved, therefore, is an activity that can take multiple forms, all of them criminal, where the highly skilled professionalism of the agent is what is prized and paid for; that is why persons with military training are preferred. The legal definition of mercenary will thus have to be sufficiently broad to cover the various forms of criminality that mercenary activities comprise;

(h) The new legal definition of mercenary should include the use of mercenaries by private companies offering military security services internationally, which employ them in activities generally linked to internal armed conflicts or to undermine the self-determination of peoples. Accordingly, there would need to be an international legal method of regulating and supervising these companies, so as to prohibit them from recruiting and employing mercenaries in any type of intervention that would mean their direct participation in military operations in the context of international or internal armed conflicts;

(i) The fact that it may be a government which hires mercenaries, or hires companies which in turn recruit mercenaries, for its own defence and political purposes within its country or to bolster positions in armed conflicts does not change the nature of the act or its illegitimacy. The principle that should be adopted in elaborating the new legal definition of mercenary is that the State is not authorized to recruit and employ mercenaries. International law and the constitutional law of each State assign the tasks of security, public order and defence to the regular military and police forces. Mercenaries cannot be included within the scope of these tasks because they are considered to maintain ties to criminal operators and activities. They are used to do what regular army troops cannot do because that would exceed the powers of a legal authority responsible for the public order and security of a country;

(j) The proposal for a new legal definition of mercenary should also take into account the fact that the current norms of international and customary law referring to mercenaries and their activities condemn mercenary acts in the broad sense of paid military services that are not subject to the humanitarian norms applicable in armed conflicts — services which usually lead to the commission of war crimes and human rights violations;

(k) The provisions in force include a requirement that a mercenary be a "foreigner" in the affected country, along with other requirements for defining a person involved in such acts as a mercenary. Nevertheless, accumulated experience shows that this requirement is not essential to the identity of a mercenary act. What is more, it has been seen that in a number of armed conflicts, nationals of the affected country have been used for an attack or illegal action planned from outside the country in order to conceal their status as mercenaries. This requirement of being a foreigner should be reviewed, so that the definition rests mainly on the

nature and purpose of the unlawful act to which an agent is linked by means of a payment. To the question whether a national who attacks his own country and commits crimes can be defined as a mercenary, the reply would need to be affirmative if that national is linked to another State or organization which has paid him to intervene and commit crimes against his own country. Such a paid criminal act would be a mercenary act because of its nature and purpose.

55. The meetings of international experts convened by the Office of the High Commissioner for Human Rights have been particularly important for the elaboration of a new legal definition of mercenary. Their reports contain valuable discussions and updated information which the Special Rapporteur has utilized whenever he has deemed it personally useful and enriching in relation to the fulfilment of his mandate to propose a new legal definition of mercenary. Nevertheless, the two reports contain a wealth of doctrinal and conceptual insights that should be taken into account by the relevant United Nations bodies. In any event, it must be pointed out that the reports of the two meetings, while differing in some respects, nonetheless agree on the necessity of improving the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, which is now in force, by making changes to the legal definition of mercenary.

56. It should be noted that the first meeting of experts did an excellent job of providing updated information on the presence of mercenaries in armed conflicts, noting their diversification and the dangers they pose. At that meeting, held from 29 January to 2 February 2001, the experts pointed to the need for "an appropriate legal framework". They concluded specifically that: "There are no effective punitive norms for 'old' mercenary activities and new forms of mercenary activities fall outside existing frameworks. Few national laws make new forms of mercenarism an offence and international law is still deficient in this respect".

57. Among the report's recommendations is one in paragraph 113 which is reproduced here because of its importance: "Although the Statute of the International Criminal Court does not refer to mercenaries, the group [of experts] recommends that further consideration should be given to the extent to which mercenarism could be considered an aggravating circumstance in the event of liability for genocide, crimes against humanity and war crimes".

58. This recommendation is of the greatest importance, because it proposes a concept related to the seriousness of mercenary conduct, to the point where it would be considered an aggravating circumstance in crimes falling under the jurisdiction of the International Criminal Court. In any event, given the current state of legislation relating to mercenaries, the connection that the experts propose in this regard cannot be made — an argument which also militates in favour of a new legal definition of mercenary and its inclusion in the Convention.

59. For its part, the second meeting of experts addressed the topic of the legal definition of mercenary and also expressed the need to amend the definition in article 1 of the 1989 Convention. Indeed, paragraph 43 of the report of the second meeting of experts states: "Noting that the current definition in article 1 of the 1989 Convention was unworkable and deficient as a basis for effectively criminalizing mercenary activity, and in accordance with the mandate entrusted to it by General Assembly resolution 56/232, the experts saw fit to examine the question of redefining mercenaries. The experts concluded that, in order to increase the

effectiveness of the legal framework against mercenary activities, it was necessary to amend the Convention" (E/CN.4/2003/4, para. 43).

60. To all the concepts set forth, the Special Rapporteur has added others, which have also been taken into account in the proposal for a new legal definition of mercenary. The first is that the concept of a mercenary should be inclusive; that is, it should cover the participation of mercenaries in both international and internal armed conflicts. The second (going well beyond article 47 of Additional Protocol I) is that the definition should include both the mercenary as an individual agent and mercenarism as a concept related to the responsibility of the State and organizations concerned in the planning and execution of mercenary acts. Third, mercenary activity should be considered not only in relation to the self-determination of peoples but also as encompassing a broad range of actions, including the destabilization of constitutional governments, various kinds of illicit trafficking, terrorism and violations of fundamental rights.

C. Proposed legal definition

61. The preceding paragraphs describe the long and painstaking study that the elaboration of a proposed legal definition of mercenary has entailed. In fact, the main basis for the proposal is the consensus that a new definition should be established, that it should take into account or be applicable to all forms of mercenary activity, that it should avoid a systematic accumulation of competing requirements, which would always prevent the identification of a mercenary, and, lastly, that the change should be proposed as an amendment to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. In addition, the proposal should affect neither the status nor the treatment of the obligations of mercenaries and of the parties to a conflict deriving from international humanitarian law; in other words, the amendment should be debated and approved within the text of the Convention, without prejudice to article 47 of Additional Protocol I to the 1949 Geneva Conventions.

62. In presenting the proposal, the Special Rapporteur refers first of all to the definition put forward during the second meeting of experts. While consensus was not achieved on that definition and the Special Rapporteur himself does not endorse it, it constitutes important progress with respect to the current situation. The Special Rapporteur disagrees with the elimination of the reference to private material gain and the maintenance of the blanket requirement that the mercenary be a foreigner in the country where he is sent to participate in an internal armed conflict or to overthrow or undermine the constitutional order of a State. Articles 2 and 3, as amended, are also important from the standpoint of the connections or criminal offences of mercenaries operating under contracts with private military security companies.

V. Current status of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries

63. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries, which the General Assembly adopted by resolution 44/34 of 4 December 1989, entered into force on 20 October 2001 when the twenty-second

instrument of ratification or accession was deposited with the Secretary-General of the United Nations. There are now 24 States parties to the Convention. Costa Rica deposited its instrument of accession on 20 September 2001, Mali on 12 April 2002 and Belgium on 31 May 2002.

64. Despite the objections to the definition contained in article 1, the Special Rapporteur believes that the entry into force of the Convention is a positive development, one that will make it easier to improve this important instrument by the most appropriate means. The Convention will facilitate preventive cooperation among States, better identification of situations involving mercenaries and the clear determination of jurisdiction in each case and will facilitate procedures for the extradition of mercenaries and the effective prosecution and punishment of offenders. These are all positive developments.

65. As noted above, 24 States have completed the formal process of expressing their willingness to be bound by the International Convention. Those States are: Azerbaijan, Barbados, Belarus, Belgium, Cameroon, Costa Rica, Croatia, Cyprus, Georgia, Italy, Libyan Arab Jamahiriya, Maldives, Mali, Mauritania, Qatar, Saudi Arabia, Senegal, Seychelles, Suriname, Togo, Turkmenistan, Ukraine, Uruguay and Uzbekistan. Nine other States have signed the International Convention, but have not yet ratified it. They are: Angola, Congo, Democratic Republic of the Congo, Germany, Morocco, Nigeria, Poland, Romania and Yugoslavia.

66. From the standpoint of enhancing effectiveness in the fight against mercenary activities, the Special Rapporteur wishes to point out that it is in the interest of States to consider ratifying or acceding to the International Convention. This is because the growth of mercenary activities around the world and the extent of the unlawful acts in which mercenaries are involved require that the international instrument designed to combat such activities be supported by a large number of States. Moreover, if the Convention has to be amended in order to increase its effectiveness in prosecuting international crimes and unlawful acts attributable to mercenaries, a large number of States parties should be involved in the proposals and mechanisms to be implemented.

VI. Conclusions

67. The definition proposed by the Special Rapporteur reflects the multipurpose criminal characteristics of mercenary activity. As set forth in the annex to this report, it is linked to participation in armed conflicts and attacks against the self-determination of peoples. It includes other illicit activities such as trafficking in persons and migrant trafficking in arms and ammunition, drug trafficking, terrorism, destabilization of legitimate Governments, taking forcible control of valuable natural resources and organized crimes such as abduction, robbery and assault. The definition considers mercenaries who participate directly in the crime to be criminally responsible and extends such responsibility to anyone who recruits, finances, employs or trains mercenaries to participate in an activity defined as criminal.

68. The Special Rapporteur suggests that private companies offering military security services internationally should be regulated and placed under international supervision. They should be warned, however, that recruiting mercenaries who commit the acts set forth in the amended International Convention amounts to a

violation of international law and will entail prosecution of both the mercenary and the agency that hires and employs him.

69. The Special Rapporteur believes he has thus fulfilled the task assigned to him by the General Assembly. He takes this occasion to suggest that this report should be brought to the attention of the States parties to the 1989 Convention and the United Nations special mechanisms responsible for studying and evaluating the international instruments adopted by the organization.

70. The Special Rapporteur's 16-year mandate to study the use of mercenaries has enabled him to accumulate and systematize information leading to the conclusion that mercenaries are multipurpose professionals who provide their assistance for activities not permitted by international law, such as activities affecting self-determination; participation in armed conflicts, where services are offered in favour of one of the parties to the conflict; activities destabilizing legitimate governments; or activities entailing offences that violate human rights.

71. Mercenary activity signifies the commission of a crime, meaning that whatever form it takes, the law cannot accept or condone the existence of mercenaries. Mercenary activity must be prohibited and made subject to criminal penalties, whether it results from recruitment on an individual basis or recruitment by organizations, groups, private security companies or States that hire mercenaries for use in criminal activities.

72. During his mandate, the Special Rapporteur has observed that the legal instruments available to define mercenary acts and characterize mercenary conduct are insufficient and in some aspects deficient or have serious gaps.

73. The Special Rapporteur also believes that this thematic mandate should be maintained, but adapted to cover all aspects in which, according to current investigations, mercenary activity is found.

VII. Recommendations

74. Based on the foregoing conclusions, the Special Rapporteur recommends the following:

(a) The General Assembly, on reaffirming its condemnation of mercenary activities, should prohibit any form of activity that encourages the presence of mercenaries and should suggest that the Commission on Human Rights extend the mandate on mercenary activities, whatever their form, since mercenary activity is criminal conduct that affects the self-determination of peoples and serves foreign interests that pose a threat to life and to the natural resources, political stability and territorial integrity of the affected countries and since the presence of mercenaries is linked to violations of human rights.

(b) The General Assembly should circulate among the States parties to the Convention the proposed new legal definition of mercenary, which would replace existing articles 1, 2 and 3 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, and suggest that they study it and adopt a position thereon.

(c) The States parties to the Convention and any other State Member of the United Nations interested in learning the nature and scope of an amendment to the

text of the International Convention as proposed by the Special Rapporteur should maintain cooperative relations with the Special Rapporteur until the expiration of his mandate in July 2004.

(d) The General Assembly should arrange for the distribution of the proposed new legal definition of mercenary to enable the Special Rapporteur to gather comments and observations and systematize them as additional contributions to the discussion preceding the review and acceptance of amendments to the International Convention.

Annex

Proposed amendments to the definition of mercenary contained in the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries

The Special Rapporteur proposes the following amendments to the first three articles of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries:

Article 1

For the purposes of the present Convention,

1. A mercenary is any person who:

(a) Is specially recruited locally or abroad in order to participate in an armed conflict or in any of the crimes set forth in article 3 of this Convention;

(b) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict or of the country in which the crime is committed. An exception is made for a national of the country affected by the crime, when the national is hired to commit the crime in his country of nationality and uses his status as national to conceal the fact that he is being used as a mercenary by the State or organization that hires him. Nationality obtained fraudulently is excluded;

(c) Is motivated to participate in an armed conflict by profit or the desire for private gain;

(d) Does not form part of the regular armed forces or police forces at whose side the person fights or of the State in whose territory the concerted act of violence is perpetrated. Similarly, has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

2. A mercenary is also any person who, in any other situation:

(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) Overthrowing a government or otherwise undermining the constitutional, legal, economic or financial order or the valuable natural resources of a State; or

(ii) Undermining the territorial integrity and basic territorial infrastructure of a State;

(iii) Committing an attack against the life, integrity or security of persons or committing terrorist acts;

(iv) Denying self-determination or maintaining racist regimes or foreign occupation;

(b) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict or of the country in which the crime is committed. An exception is made for a national of the country affected by the crime, when the national is hired to commit the crime in his country of nationality and uses

his status as national to conceal the fact that he is being used as a mercenary by the State or organization that hires him. Nationality obtained fraudulently is excluded;

(c) Is motivated to participate in an armed conflict by profit or the desire for private gain;

(d) Does not form part of the regular armed forces or police forces at whose side the person fights or of the State in whose territory the concerted act of violence is perpetrated. Similarly, has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

Article 2

Any person who recruits, uses, finances or trains mercenaries, as defined in article 1 of the present Convention, commits an offence for the purposes of the Convention.

Article 3

1. A mercenary, as defined in article 1 of this Convention, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an international crime for the purposes of the Convention. A mercenary who participates in the following acts also commits an internationally prosecutable offence: destabilization of legitimate governments, terrorism, trafficking in persons, drugs and arms and any other illicit trafficking, sabotage, selective assassination, transnational organized crime, forcible control of valuable natural resources and unlawful possession of nuclear or bacteriological materials.

2. Nothing in this article limits the scope of application of article 4 of this Convention.

3. Where a person is convicted of an offence under article 1 of the Convention, any dominant motive of the perpetrator should be taken into account when sentencing the offender.